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Supreme Court of the United States

OCTOBER TERM, 1956

No. - 568

2

LOVANDER LADNER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1956
CERTIORARI GRANTED NOVEMBER 13, 1956

Supreme Court of the United States

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[fol. A] IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CAPTION—(Omitted in printing)

[fol. 2] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

INDICTMENT—Filed June 13, 1944

The Grand Jurors of the United States of America, duly and legally elected, empaneled, sworn and charged, at the Term aforesaid, of the Court aforesaid, to inquire in and for the Southern District of Mississippi, upon their oaths present that LOVANDER LADNER, and RAMSEY PATRICK CAMERON, alias "Ramsey Ladner", whose full and true names, other than as herein stated, are to the Grand Jurors unknown, and hereinafter referred to as the Defendants, on or about the 22nd day of May, 1944, in the Southern Division of the Southern District of Mississippi, and within the jurisdiction of said Court, did then and there knowingly, wilfully, unlawfully and feloniously,

..... conspire, combine, confederate and agree together, and with one another, and each with the other, to commit an offense against the United States of America, to wit: unlawfully, wilfully, knowingly and feloniously to violate the provisions of Section 254, Title 18 of the United States Code, that is [fol. 3] to say, they so conspired, confederated, combined and agreed together, and each with the other, to wilfully and by means and use of deadly and dangerous weapons, to commit an assault on acting commissioned officers of the United States, to wit, Federal Investigators and Agents of the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department of the United States, on account of the performance of their official duties, and while such officers were then and there engaged in the performance of their official duties and were then and there transporting prisoners who were then and there under arrest and in the custody of said officers and were being transported by said officials from the scene of the

prisoners' arrest to the County Jail in Gulfport, Mississippi, and the said defendants at the time they so conspired, confederated, combined and agreed together, as aforesaid, knew such officers to be acting and commissioned officers of the United States, as aforesaid.

And the Grand Jurors aforesaid do further present that after having wilfully conspired, combined and confederated as aforesaid, and subsequent to the formation of said conspiracy, and during the existence thereof, certain of said persons, at the several times and places hereinafter mentioned in connection with their respective names, did do certain overt acts in furtherance thereof and to effect and accomplish the purpose and object of said unlawful conspiracy as follows, to-wit:

[fol. 4]

Overt Acts

1. Lovander Ladner, on or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, ran from an illicit whiskey distillery to avoid being arrested by the officers, as aforesaid, and went to the home of Lawrence Ladner and reported the incident.

2. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, Lovander Ladner engaged in a conversation with the defendant Ramsey Patrick Cameron at the home of Lawrence Ladner soon after the arrival of Lovander Ladner who had fled from the illicit whiskey distillery.

3. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, the defendant, Ramsey Patrick Cameron, had a private conversation with Wilton Ladner, and immediately following the conversation, Wilton Ladner rode away on horseback in the direction of his home.

4. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, the defendants, Ramsey Patrick Cameron and Lovander Ladner, rode off together from a group of men and went in the direction of Ramsey Patrick Cameron's house where they left their horses and soon there-

[fol. 5] after were seen walking in the direction of and near the scene of the assault upon the officers, and the defendant, Lovander Ladner, was carrying a shotgun in his hand.

5. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, the defendant Ramsey Patrick Cameron was seen to contact Wilton Ladner who had returned from his mission on horseback, and this meeting occurred very near the scene of the assault upon the officers.

6. On or about May 22, 1944, in the Southern Division of the Southern District of Mississippi, the defendants Lovander Ladner and Ramsey Patrick Cameron went to the scene where the assault was committed upon the officers, were there a few minutes before the assault and at the time of the assault upon the officers.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do say that the said defendants, continuously during the period of time, at the places and in the manner and form aforesaid, wilfully and feloniously did conspire to commit and offense against the United States, and certain of said defendants did do and perform acts to effect the object of said conspiracy, in violation of Section 88, Title 18, United States Code,

..... contrary to [fol. 6] the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Second Count

And the Grand Jurors aforesaid, at the Term aforesaid, of the Court aforesaid, upon their oaths aforesaid, do further present that the defendants, Lovander Ladner and Ramsey Patrick Cameron, alias "Ramsey Ladner", on or about the 22nd day of May, 1944, in the Southern Division of the Southern District of Mississippi, and within the jurisdiction of this Court, did then and there knowingly wilfully, unlawfully and feloniously,

..... by means and

use of deadly and dangerous weapons, to wit: loaded shotguns, a more particular description of said shotguns being to the Grand Jurors unknown, forcibly assault James Buford Reed who was then and there a duly appointed acting and commissioned officer of the United States, to wit: a Federal Investigator and Agent of the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department of the United States, on account of the performance of his official duties, and while he, the said James Buford Reed was then and there engaged in the performance of his official duties, in that the said James Buford Reed, acting as aforesaid, then and there jointly with W. W. Frost, another such Agent and Officer, had [fol. 7] under lawful arrest and in their custody, Elmer Ladner, Alphone Saucier and Paverine Saucier, and were transporting them from the scene of their arrest to the County Jail in Gulfport, Mississippi, and the said defendants, with the deadly and dangerous weapons aforesaid, shot and seriously wounded the said James Buford Reed, and the said defendants then and there well knew the said James Buford Reed to be such officer of the United States, in violation of Section 254, Title 18, United States Code,

..... contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Third Count

And the Grand Jurors aforesaid, at the Term aforesaid, of the Court aforesaid, upon their oaths aforesaid, do further present that the defendants, Lovander Ladner and Ramsey Patrick Cameron, alias "Ramsey Ladner", on or about the 22nd day of May, 1944, in the Southern Division of the Southern District of Mississippi, and within the jurisdiction of this Court, did then and there knowingly, wilfully, unlawfully and feloniously

..... by means and use of deadly and dangerous weapons, to wit: loaded shotguns, a more particular description of said shotguns being to the Grand Jurors unknown, forcibly assault W. W. [fol. 8] Frost who was then and there a duly appointed

acting and commissioned officer of the United States, to wit: a Federal Investigator and Agent of the Alcohol Tax Unit of the Internal Revenue Service of the Treasury Department of the United States, on account of the performance of his official duties, and while he the said W. W. Frost was then and there engaged in the performance of his official duties, in that the said W. W. Frost, acting as aforesaid, then and there jointly with James Buford Reed, another such Agent and Officer, had under lawful arrest and in their custody, Elmer Ladner, Alphonse Saucier and Paverine Saucier, and were transporting them from the scene of their arrest to the County Jail in Gulfport, Mississippi, and the said defendants, with the deadly and dangerous weapons aforesaid, shot and wounded said W. W. Frost, and the said defendants then and there well knew the said W. W. Frost to be such officer of the United States, in violation of Section 254, Title 18, United States Code,

..... contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

(S.) Toxey Hall, United States Attorney.

A True Bill:

(S.) J. F. Boardman, Foreman of the Grand Jury.

[fol. 9] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

EXHIBIT 1

Statement of Ares J. Hoda

Kiln, Mississippi

made May 24, 1944, in room two Meadow Building,
Gulfport, Mississippi in the presence of:

Clyde D. Pace, Special Investigator, Alcohol Tax Unit.
Edgar C. Fortenberry, Special Agent, F. B. I.

Ed L. Blue, Special Agent, F. B. I.

Cecil D. Meeks, Investigator in Charge, Alcohol Tax Unit.

My name is Ares J. Hoda; I am married and live on my own place about three quarters of a mile east of Hocky Hill Church, in Hancock County, Mississippi, I have lived there in that community all of my life.

On Monday, May 22, 1944, I went up to Ramsey Cameron's house; I got there around eight o'clock in the morning, soon after I got to Ramsey's house Harvey Malley got there. Ramsey, Harvey and me then went over in the woods to Pen Sheep. After we had been in the woods for a little while we ran across Lawrence Ladner, Chester Ladner, Avin Saucier and Leverne Neciase who were also penning sheep. We all drove the sheep up to Lawrence Ladnier's house and put them in the pen [fol. 10] there at his house. We stayed there until after dinner. I remember that around dinner time Lovander Ladner walked up to Lawrence Ladner's house. I recall that I saw Lovander Ladner and Ramsey Cameron standing off talking to each other several times, but I did not hear their conversation and don't know what they were talking about. I was sure that the officers were out there and that something had happened, but I did not know what it was. After we got the sheep separated at around 2:00 or 2:30 o'clock, we took some of them to Ramsey Cameron's house. I remember that Ramsey Cameron, Leverne Necaise, Lawrence Ladner, Wilton Ladner, Lavander Ladner, Harvey Malley and me left Lawrence Ladner's house with the sheep. When we got up near Elmer Ladner's house I saw Ramsey Cameron and Wilton Ladner drop back behind the rest of us; they stood there and talked for a little bit and then Wilton rode off through the woods and toward his house. After Wilton left us, Ramsey Cameron and Lovander Ladner rode on ahead of us and toward Ramsey's house. I did not know what they were up to, but I was suspicious of them and me and Harvey Malley talked to Lawrence Ladner about it, I asked Lawrence to talk to Ramsey and Lovander and find out what they were up to; I told him that

I was afraid that they were fixing to get into trouble and that maybe he could stop them. Lawrence Ladner, Harvey Malley, Leverne Necaise and me drove the sheep on to Ramsey's house; when we got up there in the road [fol. 11] and about 200 yards from Ramsey's house I saw Ramsey Cameron and Lovander Ladner coming from toward the house; they had crossed the road and were over in the woods and I noticed that Lovander Ladner was carrying a shot-gun in his hand. At that time Lawrence Ladner left us and walked out and met them and stopped there and talked to them. I did not hear what Lawrence said to Ramsey and Lovendar, but he told us later that he tried to get them to come on back to the house and stay out of trouble.

After Lawrence started on back toward us, I saw Lovander walk on across the woods and toward the place where I later learned that the officer was shot. I saw Ramsey walk on down the road a little ways where he met Wilton Ladner. Wilton was still on his horse and I could not see what he had, if anything, but I did see him stop and talk with Ramsey. Wilton then rode on up to the house and helped Lawrence, Harvey, Leverne and me to put the sheep in the pen.

After we had got the sheep in the pen, Harvey and me talked with Lawrence Ladner about what Lovander and Ramsey were up to and Lawrence said that he tried to get them to come on back and to stay out of trouble, but that they would not listen to him. Harvey and me then got on our horses and rode off up the hill and north and a little east of Ramsey's house. Just as we left the [fol. 12] house I saw Leverne Necaise leave and ride off in the direction of his home. He lives up the road and toward Rocky Hill Church from Ramsey's house. We left Lawrence Ladner and his wife there at Ramsey's house with Wilton Ladner and Ramsey's wife and children; they were all out in the barn yard milking. After we got up in the woods, around a half mile from the house, Wilton Ladner caught up with us. At that time we were still in sight of Ramsey's house and could see that Lawrence Ladner was still there at the barn. I recall that soon after Harvey and me rode away from Ramsey's

house that I could see Lovander Ladner and Ramsey Cameron standing down there in the bushes, just off the road to the west side of the road and at the place where Mr. Reed was shot. I could not see if they had guns or not, but could see them standing there and I knew in my own mind that they were there for no good purpose.

We rode on up in the woods a short distance after Wilton Ladner caught-up with us and I heard five shots. The shots were fired at the place where I saw Ramsey Cameron and Lovander Ladner standing and just a few minutes after I saw them standing there. We stopped and looked back, but I was unable to see anything, I did hear a motor of a car racing and in a little-bit saw a cloud of dust comming up from the road and it looked to me like that it was being stirred up by a car and that [fol. 13] the car was going on toward Dedeaux School. I could tell that three of the shots were fired in quick order and then a short time later two more shots were fired. I would say that we were at least a half mile from the place where the shooting occured and I am not able to say just how many shots were fired, but do know that there were at least five of them.

A short time after the car drove off toward Dedeaux I heard a car start up at Ramsey Cameron's house and it went off in the direction of Rock Hill Church. I could see the dust on the road from this car, but I was too far away to see who was in it, infact I could not see the car, but it sounded like Ramsey Cameron's old Ford truck.

After seeing the truck, or hearing the truck going up toward Roc'y Hill, we rode on across the woods to Arthur Ladner's house and talked with Arthur and his wife; Harvey Malley traded bridles with Arthur, or changed bridles with him. While we were at Arthurs house, Wilton Ladner rode off and I did not see which way he went. Harvey and me stayed there for a little while and then rode on over to his house, stayed there a few minutes and then we rode on up to the rode and passed close by Ramsey Comeron's house; I guess that when we passed Ramsey's house it had been about two

hours since the shooting occurred. I saw Ramsey Cameron [fol. 14] and Lovander Ladner there at the house, but I did not say anything to them, but they were standing in front of the barn.

We then rode on down to Lawrence Ladner's house and we got there just a little while before dark. Lawrence Ladner was out there sheering sheep, but I don't think that there was any one else there with him. I remember that me or Harvey, one or the other of us, asked Lawrence if he had heard if anybody got bad hurt or not and he said that he did not know, that he had not heard. There was very little said, because Harvey and me then went on back home and then rode on over to F. E. Ladner's store. On our way from the store we stopped at Roy Koenenn's house and Roy told us that he saw the officers; that Mr. Reed was shot pretty bad and that the other officer got a few shots; he showed us a small shot that he said he got out of the officers face.

When the officers first questioned me regarding the shooting, I denied knowing anything about it. I did this for the reason that Ramsey Cameron and Lovander Ladner are both brother-in-laws of mine, but when Mr. Pace explained the situation to me this afternoon, I decided that I would tell the truth about it. I can not afford to get into trouble over something that I had nothing to do with. I cant think of anything else that I know about the shooting, if I did I would not hesitate to tell it.

[fol. 15] I have read the foregoing statement, consisting of two type written pages, beside this one, I understand this statement and swear that it is the truth to the best of my knowledge and belief.

Signed (S.) Ares J. Hoda

Subscribed and sworn to before me this 24th day of May 1944.

(S.) Clyde D. Pace, Special Investigator,
Alcohol Tax Unit.

Witnessed: (S.) Harvey Malley
(S.) W. W. Frost In. A.T.U.
(S.) Joe B. Everett

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURY AND VERDICT OF GUILTY—Filed June 23, 1944

This day came into open court the United States Attorney, prosecuting for and on behalf of the United States, and also came the defendants herein in their own proper person, and by their attorneys, who being legally arraigned, plead not guilty to the above styled and numbered indictment against them; and of that they put themselves upon the country; and the United States Attorney did the like.

[fol. 16] Thereupon came Ben A Lancaster and eleven other good and lawful men who composed the jury and who, having been examined, accepted and sworn to try the issues joined between the United States and the defendants, after hearing the testimony of all witnesses, the arguments of counsel, and the instructions of the Court, and having duly considered the same, returned into open court the following verdict:

"We, the jury, find the defendants guilty as charged in the indictment."

COB#2 P992

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JUDGMENT AND COMMITMENT—June 23, 1944

On this 23rd day of June, 1944, again, came the United States Attorney, and the defendant Lovander Ladner appearing in proper person, and by his attorneys, Grayson B. Keaton and Howard McDonald and,

The defendant having been convicted on a verdict of guilty of the offenses charged in the indictment in the above-entitled cause, to wit: on counts 1, 2 and 3:

Conspire, confederate, combine and agree to wilfully and by means and use of deadly and dangerous weap-

ons, to commit an assault on acting commissioned officers [fol. 17] of the United States: Federal Investigators and Agents of the Alcohol Tax Unit; forcibly assault said officers;

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of

Count #1: Two (2) Years; said sentence imposed on Count #1 to run concurrently with sentence imposed on Count #2;

Count #2: Ten (10) Years;

Count #3: Ten (10) Years; said sentence imposed on Count #3 to begin to run from and after the expiration of the above sentences imposed on Counts #1 and #2;

IT IS FURTHER ORDERED that a total sentence is imposed against said defendant, in this Indictment, of twenty (20) Years to serve.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the [fol. 18] United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(S.) S. C. Mize

S. C. Mize, United States District Judge.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO CORRECT SENTENCE—Filed January 22, 1955

Comes now the defendant Lovander Ladner in proper person and respectfully moves the court to correct the

aggregate sentence in the above-styled case by making the ten year sentence imposed on count three (3) concurrent with the ten year sentence imposed on count two (2), and concurrent with the two year sentence imposed on count one (1), instead of consecutive thereto, so that the aggregate sentence on all three counts will be ten (10) years instead of 20 years, for the following reason:

Counts 2 and 3 charge a single offence, and the imposition of consecutive sentences on those counts constitutes double punishment in violation of the fifth Amendment.

A supporting brief is attached hereto and is by reference incorporated herein.

Respectfully submitted

[fol. 19] (S.) Lovander Ladner, Defendant pro se
P. M. B. 64197, Atlanta, Georgia

Certificate of Service (omitted in printing)

[fol. 20]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

COPY OF LETTER—Filed February 23, 1955

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
GULFPORT, MISSISSIPPI

CHAMBERS OF
SIDNEY C. MIZE
DISTRICT JUDGE

Feby. 23rd, 1955.

[fol. 21] Mr. Lovander Ladner

Box PMB,
Atlanta, Ga.

Dear Sir:

I have considered your motion to change the sentence imposed upon you and have reached the conclusion that

I do not have the power to change it. This is the same type of motion you made once before and I reached the same conclusion then. I am filing an opinion in the case and herewith enclose you a copy for your file. I will sign an order on the 26th and file with the clerk that day. I am enclosing you a copy of the order that will be signed and filed.

If you keep a good conduct record later on I will recommend your parole.

Yours truly,

(S.) S. C. Mize

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

OPINION OF THE COURT ON MOTION TO CHANGE SENTENCE—

Filed February 23, 1955

The defendant who is now serving a sentence imposed by this court upon him after he was convicted by a jury under an indictment in the three counts—the first being a conspiracy to kill two ATU agents and the second and third being for an assault and battery upon each of two [fol. 22] ATU agents with deadly weapons—moves the court to change the sentence that was imposed. The defendant was represented well at the trial by counsel of his own choosing and was convicted of an assault upon James Buford Reed as charged in the second count and an assault upon W. W. Frost as charged in the third count, each assault being with a deadly weapon. The case was tried several years ago, and prior to the time the law provided for an official court reporter. There was no transcript of the testimony made nor was any bill of exceptions taken to any of the proceedings nor was there any appeal prosecuted from the conviction and sentence. However, the court recalls that the testimony showed that more than one shot was fired into the car in which the officers were riding with a prisoner they had arrested. The evidence was sufficient to convict the defendants and each count of the indictment was for an

assault upon a different officer with a deadly weapon. Each count stated a separate offense and the sentence imposed was within the limits of the law. The statute under which defendant was indicted provides that whoever assaults ANY person designated in section 114, etc., and also whoever in the commission of ANY such Acts uses a deadly weapon, etc. and very clearly makes an assault upon each officer a separate crime. Sec. 111, Title 18 of U. S. code. See also Barrett vs Hunter, 180 Fed. (2d) 510; United States vs St. Clair, 62 Fed. Supp. 795;

[fol. 23] The defendant made substantially the same motion heretofore and it was overruled. See United States vs Cameron, 84 Fed. Supp. 289 and the facts are there stated.

The motion will be overruled, and an order may be drawn to this effect.

This the 23rd of Feby. 1955.

(S.) S. C. Mize, U. S. District Judge.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ORDER OVERRULING MOTION TO CORRECT SENTENCE—

Filed February 26, 1955

The motion of the defendant to set aside the sentence heretofore imposed on the defendant and to correct the sentence that was imposed upon him upon his conviction of an indictment consisting of three counts came on to be heard and the court having considered the entire record in the cause is of the opinion that the motion is without merit. I have examined the motion, the files and the entire records of the case and they show conclusively that the petitioner is not entitled to any relief and it is not necessary that he be brought into court for consideration of his motion.

It is therefore ordered by the court that the motion of the defendant, Lovander Ladner, be and the same is hereby overruled.

[fol. 24] Ordered this the 26th day of Feby. 1955.

(S.) S. C. Mize, District Judge.

COB5P275

[fol. 25] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

NOTICE OF APPEAL—Filed March 21, 1955

Pursuant to court order of Feb. 26, 1955 denying defendants "motion to correct sentence," Defendant hereby Respectfully moves to appeal the case to the U. S. Court of Appeals.

Respectfully submitted

(S.) Lovander Ladner, Defendant Pro-se
U. S. Penitentiary, Atlanta, Georgia

[fol. 26] * * * *

[fol. 27] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

COPY OF LETTER—Filed April 21, 1955

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
GULFPORT, MISSISSIPPI

CHAMBERS OF
SIDNEY C. MIZE
DISTRICT JUDGE

April 19, 1955

Mr. Lovander Ladner—64197-A
Box PMB
Atlanta, Georgia

Dear Sir:

The Clerk has called to my attention the Notice of Appeal filed March 21 and also your application to appeal

in Forma Pauperis, and I have considered same and have concluded to allow the appeal. I am appointing Honorable Bidwell Adam of Gulfport, Mississippi to represent you in this appeal. I do not think there is any merit in your appeal, but believe you are prosecuting it in good faith and I have instructed the Clerk to prepare [fol. 28] the record.

I am enclosing you copy of orders which I am this day signing and filing with the Clerk.

Yours truly,

S. C. Mize,
(S.) S. C. Mize, U. S. District Judge

CC: Miss Loryce E. Wharton, Clerk, United States District Court

Jackson, Mississippi

Honorable Robert E. Hauberg, United States Attorney, Jackson, Mississippi

Honorable Bidwell Adam

Gulfport, Mississippi

[fol. 29] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL—

April 19, 1955

It is ordered by the Court that the time for filing and preparing the record on appeal in the above styled cause by the Clerk be, and it is hereby extended, for a period of ninety days from this date.

ORDERED, this the 19th day of April, 1955.

(S.) S. C. Mize, United States District Judge

Cob5p-312

Filed April 21, 1955

[fol. 30] • • • •

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—

January 26th., 1956.
(omitted in printing)

[fol. 33] (File Endorsement Omitted)

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 15560

LOVANDER LADNER,
Appellant,
versus

UNITED STATES OF AMERICA,
Appellee.

*Appeal from the United States District Court for the
Southern District of Mississippi.*

Before HUTCHESON, Chief Judge, and JONES and
BROWN, Circuit Judges.

OPINION—February 29, 1956

JONES, Circuit Judge: The appellant, Lovander Ladner, and another, Ramsey P. Cameron by name, were convicted on all of the charges of a three count indictment. The first count alleged conspiracy to assault officers of the United States while performing their official duties; the second charged an assault upon Buford Reed, a Federal Investigator and Agent of the Alcohol Tax Unit of the Treasury Department in violation of 18 U.S.C.A. § 111, formerly § 254; the third count set forth an identical assault upon W. W. Frost, another Federal Agent. The appellant was sentenced to two years on the first count and ten years on each of the other two

counts. The sentences on counts one and two were to run concurrently. The sentence on count three was to run consecutively with and begin at the expiration of the sentence on the second count conviction. No appeal was taken from the judgment.

The appellant has filed a motion under 28 U.S.C.A. §2255 for the correction of his sentence. In his motion the appellant asserts that counts two and three charge but one offense for which he could not have been properly sentenced for more than ten years. In an attached brief the appellant states that evidence at the trial "showed that the two officers were together on the front seat of an automobile, and that the defendant fired a shotgun into the vehicle". The statement does not expressly say that only one shot was fired but the decisions to which he refers show that the underlying premise of his motion was that one shot and no more was fired. On the theory that it could be shown that there was but one shot fired, it was urged before the District Court and here that but one offense was committed for which the maximum imprisonment was ten years. The District Judge filed an opinion saying, among other things, that the statute clearly makes an assault upon each officer a separate [fol. 35] crime. An order followed in which the court found the motion to be without merit and the appellant entitled to no relief. It was found too that it was not necessary that the appellant be brought into court for consideration of and a hearing on his motion.

Since no transcript was made of the testimony, we have no enlightenment from the record as to the number of shots fired. In the record is a copy of a sworn statement of Ares J. Hoda, a brother-in-law of both the appellant and his co-defendant, Ramsey P. Cameron. The statement was made two days after the shooting occurred and about a month prior to the trial. In this statement it was said by Hoda that he heard five shots fired from a place where he had, a short time before, seen the appellant and Cameron. Hoda was a half mile distant from the place where the shooting occurred. He did not attempt to identify those who were involved. How this document found its way into the record is not explained.

If introduced in evidence it must have been with the consent of appellant. It cannot be regarded, on the record before us, as proving or tending to prove any fact material to the matter under consideration.

In the court's opinion it is recited that "the court recalls that the testimony showed that more than one shot was fired", but in the order there is no such recital. On the contrary, in the order the District Judge says "I have examined the motion, the files and the entire records of the case and they show conclusively that the petitioner is not entitled to any relief and it is not necessary that he be brought into court for consideration of this motion". [fol. 36] Although the court may take judicial notice of its records and decisions, the judge should not make disposition of matters before him in reliance upon his personal recollection of what transpired in the trial of a cause before him, particularly where, as here, there has been a long lapse of time.

We have mentioned the court's opinion. On the day it was filed the District Judge wrote the appellant advising him that the motion would be denied. In the letter it was said "This is the same type of motion you made once before and I reached the same conclusion then". In the opinion it is said "The defendant made substantially the same motion heretofore and it was overruled. See *United States v. Cameron*, 84 Fed. Supp. 289, and the facts are there stated." In the Cameron case the court disposed of a motion to correct sentence under 28 U.S.C.A. §2255 filed by the appellant's co-defendant. The reported opinion does not refer to any like motion having been filed by the appellant. The record in this appeal does not show the prior motion or any order upon it. Government counsel, in their brief, comment upon the motion made by Cameron and refer to the opinion in the Cameron case, but make no reference to the prior motion of the appellant. Hence we cannot say whether there was any abuse of discretion in refusing to entertain a second motion on the same or substantially the same ground as the first. See *Hallowell v. United States*, 5th Cir. 1952, 197 F. 2d 926.

If the single firing of a shotgun, resulting in the wounding of two officers, can constitute but a single offense [fol. 37] under 18 U.S.C.A. §111, then the appellant's motion presents a material and substantial factual question as to whether it appeared from the evidence at the trial that the gun was only fired once. If there is a necessity for the determination of such a factual question, there must be a hearing and the appellant is entitled to be present. *Barrett v. Hunter*, 10th Cir. 1950, 180 F. 2d 510. And see *Bell v. United States*, 5th Cir. 1942, 129 F. 2d 290. On the other hand, if a single firing of a gun resulting in the wounding of two officers may constitute two separate offenses under the statute, then it becomes immaterial whether or not there was only one or more than one discharge of the weapon, and the question of fact need not be considered.

The only decision squarely in point among the reported cases which we have seen is *United States v. Cameron*, *supra*, and we can hardly rely upon it as a controlling precedent. Analogous are the mail bag cases, among which are *Warner v. United States*, 5th Cir. 1948, 168 F. 2d 765, and *Ebeling v. Morgan*, 237 U. S. 625, 35 S. Ct. 710, 59 L. Ed. 1151. In the Warner case this court held that the theft of each of several mail bags constituted a separate offense. In the Ebeling case it was held that the cutting of each of several mail bags was a separate offense. In other cases it has been held that the theft of more than one mail bag justifies but one sentence. *Johnston v. Lagomarsino*, 9th Cir. 1937, 88 F. 2d 86, *Kerr v. Squier*, 9th Cir. 1945, 151 F. 2d 308. Cases of another type to which our attention is directed are the bank robbery cases where convictions followed indictments for robbery and for jeopardizing the lives of different persons in [fol. 38] separate counts. It was held by this court that a charge of entering a bank with intent to commit larceny is a separate offense from attempted robbery, although the offense of attempting to take money is merged in a charge of the aggravated form of such offense by the use of a dangerous device. *Durrett v. United States*, 5th Cir. 1939, 107 F. 2d 438, *Wells v. United States*, 5th Cir. 1941, 124 F. 2d 334. The decisions in *Hewitt v. United States*,

8th Cir. 1940, 110 F. 2d 1, *Vautrot v. United States*, 8th Cir. 1944, 144 F. 2d 740, and *Lockhart v. United States*, 6th Cir. 1943, 136 F. 2d 122, are not in conflict with the holdings in this Circuit construing the bank robbery statute. 12 U. S. C. A. §588. *Heflin v. United States*, 5th Cir., 1955, 223 F. 2d 372, is not to be regarded as a departure from the doctrines announced in the earlier decisions of this court.

Possibly closer to our problem than the mail bag or bank robbery cases are those which involve the transportation for immoral purposes of two or more women across a state line at one time in a single vehicle in violation of the Mann Act. The Tenth Circuit has adopted the rule that in such a case there has been but one offense. *Robinson v. United States*, 10th Cir. 1944, 143 F. 2d 276. A different result has been reached in this Circuit. *United States v. St. Clair*, 62 F. Supp. 795, *St. Clair v. Hiatt*, 83 F. Supp. 585, aff. 177 F. 2d 374, cert. den. 339 U.S. 967, 70 S.Ct. 983, 94 L. Ed. 1375.

The precedents in this Circuit point us toward a conclusion that the appellant here was guilty of a separate assault upon each of the two officers who were wounded [Note: The Court of Appeals corrected this opinion April 4, 1956, by striking the last three lines supra and substituting therefor the following: But see *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L. Ed. 905, in which by a divided Court the Supreme Court reached a different result. This decision notwithstanding however, we believe that the appellant here was guilty of a separate assault upon each of the two officers who were [fol. 39] wounded] by his gun fire, and this whether he fired only once or more than once. Reason and principle are more impelling. The Supreme Court has provided us with what we regard as a sound test. It has said:

“A conviction upon one indictment would not bar a conviction and sentence upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction of the other without proof of an additional fact.” *Ebeling v. Morgan*, *supra*, cf. *Durrett v. United States*, *supra*.

The rule is equally applicable to the several counts of a single indictment as to separate indictments. The evidence here would have been sufficient to warrant the conviction of an assault upon either of the officers without any showing of the fact of an injury to the other. So measured, the order denying the motion to correct the sentence should be and is

AFFIRMED.

[fol. 40] IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15560

LOVANDER LADNER,

versus

UNITED STATES OF AMERICA

JUDGMENT—February 29, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN SUPREME COURT OF THE
UNITED STATES

No., October Term, 1956

(Title Omitted)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—May 10, 1956

UPON CONSIDERATION of the application of petitioner,
IT IS ORDERED that the time for filing petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including June 28th, 1956.

(S.) Hugo L. Black, Associate Justice of the
Supreme Court of the United States.

Dated this 10th day of May, 1956.

[fol. 44] IN SUPREME COURT OF THE
UNITED STATES

No. 80 Misc., October Term, 1956

LOVANDER LADNER,
Petitioner,

vs.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO the United
States Circuit Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—

November 13, 1956

ON CONSIDERATION of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be,
and the same is hereby, granted and the case is trans-

ferred to the appellate docket as No. 568. One hour and a half is allowed for argument in this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Brennan took no part in the consideration or decision of this application.